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No. 83-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS F. BORRELL,
Petitioner

v.

UNITED STATES INFORMATION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 12, 1984

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QUESTION PRESENTED

Whether, on a review of the third successive district court dismissal of a 1979 complaint for federal agency violation of the First Amendment, due process, and Privacy Act rights of an employee judicially recognized as a whistle-blower, a 22-line *per curiam* judgment by a panel majority, one judge dissenting, which affirmed without a statement of facts or disposition of substantial legal issues the district court's decision written more than 18 months after a bench trial, should be reversed and remanded by this Court under its supervisory powers as a matter of more effective judicial review, improved appellate procedure, and substantial justice.

PARTIES TO THE PROCEEDINGS

Petitioner is Phyllis F. Borrell, a former probationary employee of Respondent, United States Information Agency (formerly United States International Communication Agency). The American Federation of Government Employees as *amicus curiae* appeared by brief in support of Petitioner during prior proceedings before the court of appeals.

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v.

UNITED STATES INFORMATION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, not reported, is printed in Appendix C, *infra*, pp. 24a-25a.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1983 (Appendix C, *infra*, pp. 24a-25a). Petitioner's petition for rehearing by panel and suggestion for hearing or rehearing *en banc*, timely filed on December 30, 1983 (Appendix D, *infra*, pp. 26a-38a), were denied on January 13, 1984 (Appendices E and F, *infra*, pp. 39a, 40a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATUTES INVOLVED

The relevant portions of 5 U.S.C. § 552a are set forth in Appendix G, *infra*, pp. 41a-44a.

STATEMENT OF THE CASE

This petition for a writ of certiorari seeks reversal of a terse 22-line judgment entered by a court of appeals panel, one member dissenting. The panel mechanically affirmed a 24-page decision by the district court. That decision purported, for the third time, to dispose of First Amendment, due process, and Privacy Act (5 U.S.C. § 552a(g)) issues raised by a complaint filed by Petitioner in 1979. Petitioner initially obtained a temporary restraining order barring her dismissal as a probationary federal employee on December 31, 1979 (Parker, J.). Her original complaint was dismissed for lack of jurisdiction on January 10, 1980. (June L. Green, J.). The court of appeals initially affirmed but, on rehearing, reversed and remanded the case for trial.

After a bench trial involving 1,700 transcript pages, more than 250 exhibits, and 21 witnesses, held in March 1981, the district court (June L. Green, J.) dismissed, three and one-half months after trial, all of the causes of action. The court of appeals on June 22, 1982, reversed the dismissal of three causes of action relating to the First Amendment, due process, and the Privacy Act.

Borrell v. *United States International Communication Agency* (now *United States Information Agency*), 221 U.S. App. D.C. 32, 682 F.2d 981 (1982).[1] The court held that Petitioner was a bona fide whistle-blower before adverse personnel action was taken against her, as the result of which her employment was terminated. 682 F.2d at 991.

The case was remanded for compliance with its mandate and with Fed. R. Civ. P. 52(a) (Appendix G, *infra*, p. 45a). 682 F.2d at 991-93.[2] Without the benefit of proposed findings of fact and conclusions of law suggested by Petitioner and refused by the district court, its memorandum opinion and order was issued November 24, 1982, eighteen months after the bench trial, dismissing the three remaining causes of action. (Appendix A, *infra*, pp. 1a-22a).

After the submission of briefs and oral argument, a majority of the panel of the court of appeals issued its judgment on November 15, 1983 (Appendix C, *infra*, pp. 24a-25a). One judge dissented.

Relying upon Local Rule 13(c) (Appendix G, *infra*, p. 46a), the majority held that, "[w]hile the issues presented occasion no need for an opinion, they have been accorded full consideration by the court." The "clearly erroneous" rule was held to bar reversal of the "district court's conclusion that Appellant [Petitioner] failed

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[1] Dismissal of causes of action under the Civil Service Reform Act, Pub. L. No. 89-554, 80 Stat. 398 (1978), and the Freedom of Information Act, 5 U.S.C. § 552, was affirmed. 682 F.2d at 985-88, 993.

[2] The court of appeals directed the district court on remand to make "specific findings" of fact on a number of issues. These included, under the First Amendment, "the employee's job performance considered in its entirety," as required by *Mazaleski* v. *Truesdell*, 183 U.S. App. D.C. 182, 562 F.2d 701, 715 (1977). 682 F.2d at 991. The district court failed to do so. Appendix A, *infra*, pp. 8a-15a; Appendix D, pp. 34a-35a. The court of appeals panel did not deal with this important legal issue at all.

to prove that her complaints were a substantial or motivating factor in her discharge." The district court's dismissal of Petitioner's due process and Privacy Act claims "also withstands review." The majority concluded:

> * * * Essential to our decision, especially with regard to the finding that Appellant [Petitioner] was not discharged for exercising her first amendment rights, is a necessary deference to the district court's "benefit of observing the demeanor of the witnesses and otherwise evaluating their credibility during the trial." * * *

Petitioner filed a timely petition for rehearing by panel and suggestion for hearing or rehearing *en banc.* (Appendix D, *infra*, pp. 26a-38a). Her petition and suggestion were denied. (Appendices E and F, *infra*, pp. 39a, 40a).

REASONS FOR GRANTING THE WRIT

I. A Novel and Substantial Question of Appellate Judicial Administration Is Presented

Because of its First and Fifth Amendment issues, the case on appeal below should have been given "special and extended treatment." *School for Judges*, 33 F.R.D. 139, 143 (1963) (Burger, C.J.). This Court has "repeatedly emphasized the importance of a statement of the grounds for decision, both as to facts and law, as an aid to litigants and to this court." *Public Service Com'n of Wisconsin* v. *Wisconsin Telephone Co.*, 289 U.S. 67, 69 (1933) (Hughes, C.J.). These principles of judicial review present a novel and substantial question with regard to the use of Local Rule 13(c) in this case, thus affecting this Court's exercise of its "general power to supervise the administration of justice in the federal courts." *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 589 (1948). This case warrants the exercise of the Court's "broad" and "extensive control over all the courts of the United States." *United States* v. *Mun-*

singwear, Inc., 340 U.S. 36, 40 (1950); *Ex Parte Crane*, 30 U.S. (5 Pet.) 190, 192, 194 (1831).

The court of appeals panel misplaced its reliance upon Local Rule 13(c). The effect of its terse memorandum judgment is to "rubber stamp" district court findings and conclusions reached more than eighteen months after a bench trial, without the benefit of proposed findings and conclusions and not surprisingly vindicating the prior decisions theretofore consistently set aside by the court of appeals. *Barber* v. *United States*, 711 F.2d 128, 131 (9th Cir. 1983) ("* * * Since the findings of fact are stated in a way to suggest that they were predetermined by the outcome, we hold that they are clearly erroneous"). The panel also ignored the earlier court of appeals' injunction against a "laconic" disposition of constitutional issues, and committed the same error. As stated in *Borrell*, 682 F.2d at 991:

> Unfortunately, the district court made one laconic finding only: that appellant's discharge was "not tainted by unconstitutional improprieties." Surely, that cannot be enough to satisfy the requirements of Rule 52(a) of the Federal Rules of Civil Procedure in this kind of case, where the core of the dispute is whether the employee was discharged for complaining about agency irregularities, admitted in part, or for poor job performance. Here *the content of her complaint was later shown clearly to be reasonable.* * * * (emphasis added).

Under these conditions, more than a perfunctory affirmance was required. Clear and egregious errors on the face of the district court's decision[3] should bar the use

[3] The most egregious factual error of the district court was that Petitioner "did not challenge the accuracy of . . . [documents upon which her discharge was based]. Neither did any other witness." Appendix A, *infra*, p. 11a. No such finding could have been made by the district court had the court reviewed the record, including Petitioner's extensive testimony, supported by that of eight other ICA personnel, and numerous exhibits, to the contrary. Appendix D, *infra*, pp. 31a-32a.

of the "clearly erroneous" rule. (Appendix D, *infra*, pp. 31a-36a). These errors were ignored by the panel majority. Its silence on these important issues and others of constitutional dimension effectively precludes Petitioner from filing a petition for certiorari with this Court on the substantial merits of her case.

The panel majority abused its discretion in resorting to Local Rule 13(c). The latter was issued May 14, 1968, 128 U.S. App. D.C. XXXII. The rule states that it was adopted "[i]n accordance with recommendations for the improvement of judicial administration," citing authorities in a footnote. (Appendix G, *infra*, p. 46a). The authorities thus cited do not support the form and scope of the decision below. The District of Columbia crime "Report" dealt only with "amendment of the local rules to achieve an expeditious timetable for appellate proceedings in criminal cases." Canon 19 counsels a judge to "indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel." *ABA Opinions on Professional Ethics, Judicial Canon 19—Judicial Opinions* 209 (1967). The "Position" adopted by the 1964 Judicial Conference of the United States was contained in the following resolution:

> RESOLVED: That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.

Reports of the Proceedings of the Judicial Conference of the United States 11 (1964).

Indeed, recently two D.C. Circuit judges have criticized the administration of, or rationale for, Local Rule 13(c). *United States* v. *Glover*, No. 83-2088, Slip Op. at 5 (D.C. Cir. Apr. 6, 1984) (Mikva, J., dissenting: "• • • The hastened nature of a summary affirmance belies every vestige of an appeal. • • •") (criminal case); Wald, *The Problems with the Courts: Black-Robed Bu-*

reaucracy, or Collegiality Under Challenge? 42 Md. L. Rev. 766, 782-83 (1983) ("We have no consistent enforcement of rules or criteria on when to issue per curiam opinions. * * * Some of these practices need to be reevaluated. * * *").

This Court does not appear to have dealt directly with, or construed the scope of, the procedural authority which is provided for under courts of appeals' rules analogous to that of Local Rule 13(c) here invoked.[4] The writ should be granted in order that this important procedural issue can be correctly decided for the benefit of federal courts, the bar, and civil litigants, including, as here, government employees.

II. The Interests of Justice Were Not Served by the Form and Scope of the Terse Decision Below

Cases that contain

> * * * . . . dissents . . . are, by definition controversial [*i.e.*, controverted]; the court disagrees either about the result to be reached or about the method used to reach it. * * *

Reynolds & Richman, *supra*, at 612. In disposing of controverted cases,

> . . . a judge should indicate the reasons for his action . . . . He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity, and may contribute useful precedent to the growth of the law.

ABA Opinions on Professional Ethics, Judicial Canon 19 —Judicial Opinions, supra, at 209.

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[4] "[A] claim of denial of equal treatment by the courts" under the Seventh Amendment was made and raised before the Court in *Browder* v. *Director*, 434 U.S. 257 (1978). The opinion "did not address that issue." Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 623 (1981) (study sponsored by the Federal Judicial Center).

The judgment below should have contained a "thoughtful review of the facts . . . and of the laws bearing upon them." Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810 (1961). Contrary to this Court's supervisory authority, Petitioner was "entitled to [but did not receive] assurance that . . . [her] case has been thoroughly considered." *Standards Relating to Appellate Courts* ¶ 3.36 at 60 (Approved Draft 1977). "That sort of opinion [as in *Borrell*] complete with dissent not only fails to accomplish the restraining and correcting functions [of judicial opinions] but also fails to assure 'that the case was fully considered by the bench as a whole.'" Reynolds & Richman, *supra*, at 614 n.114.

Therefore, the decision below does not implement the function of appellate courts "to review individual cases to assure that substantial justice has been rendered and to develop the law for general application in the legal system." Stevenson & Zappen, *An Approach to Writing Trial Court Opinions*, 67 Judicature 336, 338 (1984) (footnote omitted). The decision below adversely affects and transforms the "clearly erroneous" rule as a "buckler and shield" for district court findings into a "sword" to make them conclusive. *Case* v. *Morrisette*, 155 U.S. App. D.C. 31, 475 F.2d 1300, 1306 (1973); *accord*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 277-82 (1982); *United States* v. *United States Gypsum*, 333 U.S. 364, 394-96 (1948).

The court of appeals' disposition of exceptions to the "clearly erroneous" rule cannot be gleaned from its terse judgment. (*See*, Appendix D, *infra*, pp. 31a-34a). Nor can the panel's judgment as to clearly egregious misstatements of the record by the district court, as well as the latter's legal errors, be ascertained. (*Id.*, pp. 32a-36a). There was no "strict scrutiny" of governmental action in a case involving "precious" constitutional rights. *Swope* v. *Lubbers*, 560 F. Supp. 1328, 1331 (W.D. Mich. 1983), *citing Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981); *Borrell*, 682 F.2d at 991.

For example, deference to the credibility findings of a district court which took the word of Petitioner's senior supervisor, who himself repeatedly took the Fifth Amendment on deposition and at trial, does not stand the test of human experience, much less of legal validity. The 100-page agency report, based on and confirming Petitioner's whistle-blowing, implicated, directly or indirectly, three of her supervisors who could have been charged with violations of law, including 18 U.S.C. § 208(a). These were the very witnesses upon whose "credibility" the district court relied in its decision. (Appendix D, *infra*, pp. 30a-31a). *See*, *Bundy* v. *Jackson*, 205 U.S. App. D.C. 444, 641 F.2d 934, 950 (1981):

> [W]e would readily reject as clearly erroneous the District Court's finding that the supervisors in . . . [Petitioner's] agency never took the ritual of harassment [her complaints] seriously and that they therefore had no motive for retaliation against . . . [her].
> • • •

The form and scope of the decision below do not serve the interests of justice. Exercise of Petitioner's right to seek a writ of certiorari, and this Court's discretionary review by such a writ, are effectively curtailed. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975) ("not clear whether the [Appeals] Court . . . passed on the claim"); *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 312 (1971) ("unsure whether it [issue] was presented below" and decided by court of appeals). "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. and P. R. Co.*, 294 U.S. 499, 510-11 (1935).

CONCLUSION

Petitioner prays that the writ be granted and the case be argued, heard, and decided. However, this may well be a situation where this Court, as a matter of judicial economy, appellate procedure, and substantial

justice should consider the issuance of a summary order granting certiorari, reversing the *per curiam* judgment below, and remanding the case for further consideration in the light of Petitioner's petition for rehearing and suggestion for rehearing *en banc*. *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357 (1956) (*per curiam*); *see*, Hellman, *"Granted, Vacated, and Remanded" —Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 391 and n. 6 (1984).

Under either procedure, this Court could deal with court of appeals' rules similar to D.C. Circuit Rule 13(c). *See, Jones* v. *Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) ("imperfection" in "screening procedures and disposition by unreported memorandum decisions"). As indicated by the consensus of a thousand participants in Appellate Judges Seminars over the last twenty-eight years:

> Appeals present ultimate issues, including law-making possibilities, and so *deserve superior handling*. (emphasis added).
>
> • • • •
>
> The appellate process demands not only sound decisions but public confidence in their soundness. Public confidence in judicial integrity is part of the demand.

Leflar, *The Multi-Judge Decisional Process*, 42 Md. L. Rev. 722, 723 (1983). Further,

> . . . every court would be helped in conducting its decisional processes if all the details of those processes were *fixed* and publicly known. • • • This enables the judges themselves, especially new judges, and the bar and interested citizens, including litigants, to know what the procedures are. This can add to any court's effectiveness by assuring added public confidence in the court's collegial responsibility and integrity. The public can know through the published procedures that the court does operate as

> a court and not as a collection of one-judge decision-makers. (emphasis added).

Id. at 730-31.

Formulation of a definitive and fair, yet judicially economical, model rule on minimal standards would be in the public interest. A model rule proposed in 1981 provides the following:

> Every [court of appeals] decision will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for the disposition can be understood from a reading of this court's opinion.

Reynolds & Richman, *supra*, at 626-27.

Respectfully submitted,

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April 12, 1984

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3492

PHYLLIS F. BORRELL,
Plaintiff

v.

INTERNATIONAL COMMUNICATION AGENCY,
Defendant

MEMORANDUM OPINION

[Filed Nov. 24, 1982]

This case was brought on December 31, 1979 by Dr. Phyllis F. Borrell, a former employee of the Exhibits Service of the United States International Communications Agency (ICA). She was discharged during her probationary period for allegedly unsatisfactory work performance.

Dr. Borrell alleged five causes of action in her amended complaint against ICA and its director, John Reinhardt. First, she claimed her termination was in retaliation for her exposure of prohibited personnel practices, thus violating the "whistleblowing" statute, 5 U.S.C. § 2302(b), and regulations thereunder, 5 C.F.R. § 1250.3(c). Second, she asserted that the actions of her supervisor, Gail Becker; division chief, Richard Suib; and Exhibits Service Chief, John Jacobs, abridged her First Amendment right to "freely and constructively . . . comment upon and improve the functions of Defendant ICA and its Exhibits Service." Complaint ¶ 5.1. Dr.

Borrell also said she was denied "an opportunity to clear her good name, reputation, honor and integrity" and that this "stigma" violated her liberty interest under the due process clause of the Fifth Amendment by impairing her employment opportunities. Complaint ¶ 6.1. For her fourth cause of action, Dr. Borrell asserted that Section 552a(g)(1)(C) of the Privacy Act, 5 U.S.C. § 552a, was violated when a memorandum dated October 31, 1979 was placed in her personnel file on or about that date without her knowledge. This memorandum, she contended, contained false, incomplete and inaccurate statements which resulted in her discharge. Dr. Borrell's final cause of action was a claim under the Freedom of Information Act, 5 U.S.C. § 552.

After a two-week trial, this Court issued a memorandum opinion finding for the defendants on all of the claims. *Phyllis F. Borrell v. International Communication Agency*, No. 79-3492 (D. D.C. June 30, 1981). On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed with respect to the "whistleblowing" and Freedom of Information Act causes of action, but remanded the case for further findings on Dr. Borrell's constitutional and Privacy Act claims. *Phyllis F. Borrell v. United States International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982).

In order to determine the validity of her First Amendment claim, the Court has reviewed the entire record in this action again, and makes specific findings regarding the nature and truth of Dr. Borrell's allegations, the circumstances and timing of her complaints, and the history of her work performance. The Court further reappraised whether or not in discharging plaintiff, her liberty interest under the due process clause of the Fifth Amendment was violated and whether or not ICA violated her right to procedural due process under the Fifth Amendment by failing to follow its own regulations, Federal Personnel Manual, ch. 315; subch. 8.3a(3), (4); 8.4(a)

(2), (4) and 8.4c. Finally, recognizing that the Court earlier misconstrued Dr. Borrell's cause of action under the Privacy Act, the Court makes findings about the accuracy and fairness of the contents of the October 31, 1979 memorandum and determines whether any inaccurate statement contained therein resulted in her discharge.

1. FINDINGS OF FACT

A. *Background*

To understand this case, the kind of office in which Dr. Borrell worked must be described at the outset. The Exhibits Service is not an ordinary government administrative office. It is composed primarily of artists, writers, photographers, and designers. These people plan, create, and operate exhibits about the United States overseas under extremely tight schedules. The attitude of the office managers and project directors, expressed throughout the trial, was that "the show must go on." They spared no effort to make each exhibit represent as well as possible that aspect of the United States it depicted. Project directors traveled abroad frequently to attend a particular exhibit, leaving their deputies to manage plans for other exhibits in their absence.

There was constant tension in the Exhibits Service between the production and creative services divisions, or more precisely, between the creative, visionary employees who developed ideas for exhibits and those prosaic managers who ensured that each show opened on time.

Dr. Borrell was hired by Richard Suib, head of the production division, in January 1979. She was the first professional employee hired from outside ICA in several years. The position which she received had been open for sixteen months before he could find someone he felt was suitable. Mr. Suib had great expectations of her. Mr. Suib expected Dr. Borrell to become a project officer. Transcript (Tr.) 1365 (testimony of Richard Suib); Tr.

26 (testimony of Phyllis Borrell). Mr. Suib recognized that Dr. Borrell was a bright individual with outstanding academic qualifications and enthusiasm, and he anticipated that she would make a positive contribution to a new exhibit to be shown in the Soviet Union. Tr. 1371.

B. *Plaintiff's Allegations of Improper Activities*

Dr. Borrell complained about several alleged improprieties in the Exhibits Service. The most important related to Mr. Arthur, an employee who frequently engaged in telephone calls at work concerning his private real estate business. *See* Tr. 237, 241. Dr. Borrell stated that she was unable to talk to this individual for several weeks in July because of his constant telephone calls about his real estate business. On July 26, she discussed with two colleagues how wrong it was for this senior official to be spending vast amounts of time on private business during office hours. Tr. 243. Nearly everyone in the Exhibits Service, including his secretary, knew and complained about this employee's conducting his real estate business on work time. This was not an unusual complaint.

Dr. Borrell alleged that her former supervisor, Ernest Gerran, made an unnecessary three- or four-day trip in July 1979 to agricultural colleges in Texas, Utah and California to obtain material that was not needed for the exhibit, "Seeds of Hope." Tr. 229-30. She voiced this complaint to several of her colleagues. This allegation was not merited, in view of the other testimony on this point. J. Gardiner Meade, project director for "Seeds of Hope" when Mr. Gerran was busy with other exhibits, testified that Mr. Gerran's trip was necessary to gather information, and that the information he collected was usable for other exhibits as well. Tr. 433-34.

Other complaints by Dr. Borrell concerned nepotism in hiring within the Exhibits Service. One such complaint was about the chief of the Exhibits Service for

hiring his wife as a translator from 1970-76 in Austria, three years before Dr. Borrell was employed at ICA, and for arranging ten days of employment for his son as a roustabout to complete an exhibit in Yugoslavia in June 1979. Another claim concerned an employee who was about to retire who suggested hiring his wife in August 1979 to write a brochure for the "New York, New York" exhibit. That employee also allegedly contributed to the brochure.

Dr. Borrell testified that on August 24, 1979, she told Gail Becker that it was wrong for the wife of an agency employee to write the brochure for the "New York, New York" exhibit. Tr. 250-B. When she learned that the employee was working on the brochure, too, she complained to Ms. Becker again. Tr. 250-F, 250-H. Ms. Becker told her to tell Richard Suib, manager of the production division of the Exhibits Service. He expressed disapproval of the employee's participation, according to Dr. Borrell. *Id.* Dr. Borrell claimed she raised the matter again in a meeting with Ms. Becker and Mr. Suib on October 16, 1979, in the context of complaining about her exclusion from aspects of the "New York, New York" exhibit, including the brochure work. *Id.*; Tr. 250 U-V.

Dr. Borrell expressed her concern about the appropriateness and credentials of the brochure writers to at least two other colleagues in late August or September 1979. Tr. 456 (testimony of Williams Caldwell, Jr.); Tr. 878 (testimony of Edward Hunter, ICA exhibits project officer). There is no evidence that Dr. Borrell complained about the hiring of Mr. Jacob's son or his wife at any time before November 14, the day plaintiff received official notice of her termination. (She was informed on October 25 by Mr. Suib of his intention to request her termination.)

Dr. Borrell's additional allegation of improper activity by her colleagues concerned the continued renewal of two

purchase order contracts without the persons having obtained a security clearance. Dr. Borrell was also concerned that they maintained regular office hours and were under the supervision of ICA employees rather than working on the outside as she had been required to do when under contract. Dr. Borrell said she complained to her union representative sometime in the summer of 1979 about the two persons working regularly in the office who were purchase order contractors. Tr. 250-EEE. However, her union representative did not mention such a conversation at trial. Rather, she said Dr. Borrell complained "she was having a hard time working under Ms. Becker," Tr. 767, and that Ms. Becker wasn't showing her the budget allocation books for the exhibit, Tr. 768.

These allegations made by Dr. Borrell through her attorney in November 1979 were thoroughly investigated and referred to the Department of Justice, which did not file any criminal charges. Discussions among ICA managers were held to ensure tighter management controls. Tr. 1532-33 (Harold Schneidman). The questioned purchase order vendors were terminated or properly hired. The three agency employees complained about retired in due course in 1979 and early 1980.

C. *Plaintiff's Work Performance*

The ICA Exhibits Service hired Dr. Borrell initially on a purchase order contract. For the first three months, she did research on audience reaction to ICA exhibits in Eastern Europe and the Soviet Union, in preparation for an exhibit scheduled to be held in the Soviet Union in 1980. After a three-week interruption in April caused by the expiration of her purchase order contract and the delay in getting a security clearance, Dr. Borrell was hired on April 23, 1979 as a permanent employee, with probationary status for one year.

Dr. Borrell was then assigned to work on "Seeds of Hope," a small agricultural exhibit to be shown in Mogadishu, Somalia. Dr. Borrell's experience in Africa gave useful background for this particular project. This project had a budget of less than $100,000 and would fill 1,500 square feet of exhibit space.

Dr. Borrell spent a lot of time at the Library of Congress in late May, June and July. Richard Suib, the production division chief of the Exhibits Service, did not believe that Dr. Borrell spent all the time she charged at the Library of Congress, for three reasons. First, he didn't see the results of all the time she spent there. Tr. 1391. Second, once when plaintiff called in early one morning to ask to be signed in, he answered the phone, and he heard a baby crying in the background. This led him to doubt that Dr. Borrell was in the Library at that time. Tr. 1395. (Dr. Borrell testified that she left her child during this period at the Department of Labor Day Care Center. She alleged that she used the Labor Department's telephone to call her office and asked to be signed in.) Tr. 1607. Third, Mr. Suib discovered that one couldn't get into the Library before 8:30 a.m. without a special pass. Yet, Dr. Borrell would call regularly between 7:45 and 8:00 a.m. to say she was doing work there. Dr. Borrell told Mr. Suib that she got in on her husband's pass, since he worked there. Mr. Suib found out that this was not allowed under the Library's regulations. Tr. 1391-92.

On July 12, 1979, Richard Suib assigned Dr. Borrell to work on the Soviet Union exhibit, which was to focus on the performing and visual arts in New York City. Tr. 1048 (testimony of Gail Becker). This "New York, New York" exhibit had a budget of over $5 million and was the agency's biggest show at the time. It was to have 20,000 square feet of exhibit space. Dr. Borrell was to be deputy project director and Ms. Becker, the project director; they met on July 12, in Mr. Suib's office

to discuss the new show. The first meeting for the "New York, New York" team followed on July 17, 1979. Dr. Borrell wished to complete some work on the "Seeds of Hope" show and did not begin to work full time on this project until August 8, 1979.

On July 23, Dr. Borrell met briefly with Ms. Becker and turned over her files of thematic research without discussing them. Tr. 276-77. At this meeting, Ms. Becker asked her to obtain useful periodicals, articles, and books, and to start keeping lists on various fine arts topics. Tr. 1066.

Ms. Becker asked Dr. Borrell at a meeting on August 8 or 9 to prepare lists for the exhibit by August 17. The two disagreed on which topics to research. Tr. 1080-81. Sporadically, Dr. Borrell submitted lists of printmakers, dancers, playwrights, video artists, and composers—on August 17, 27, 29, and the typed list on September 24.

On Mr. Suib's return from an overseas trip about August 11 he asked Ms. Becker how the project was going and how Dr. Borrell was working out. She told him that Dr. Borrell was not meeting deadlines, and spending too much time at the Library of Congress. Tr. 1108, 1310 (testimony of Gail Becker); Tr. 1390-91 (testimony of Richard Suib). Mr. Suib then asked Lucinda Cooke, a personnel management specialist at ICA, for advice. He told her Dr. Borrell was not working at the level expected. Tr. 968 (testimony of Lucinda Cooke). Mr. Suib also checked with Dr. Borrell's previous supervisors. Both of them, Mr. Meade and Mr. Gerran, said she had done a very good job for them although "sometimes she got carried away with her own opinions as to what should or should not be included in the scope of the project itself." Tr. 1011 (testimony of Ernest Gerran). Mr. Suib met with Dr. Borrell on August 15 to express concern about her "New York, New York" work performance, and he mentioned Ms.

Becker's name at that meeting. Tr. 1421-22 (testimony of Richard Suib).

Gail Becker expressed her dismay to Mr. Suib a couple of times in September on different aspects of plaintiff's work. Tr. 1396 (testimony of Richard Suib). Another meeting occurred on October 16, at which Dr. Borrell complained about her work assignments on the "New York, New York" project, and Ms. Becker and Mr. Suib expressed dissatisfaction with Dr. Borrell's work performance. Despite Ms. Becker's objections, Dr. Borrell insisted on using flextime by coming in early in the morning (or to the Library of Congress). Ms. Becker was concerned that Dr. Borrell was not in the office between 4:00 and 5:00 p.m., the time when outside contractors for the "New York, New York" project usually called. Ms. Becker was also concerned that Dr. Borrell failed to keep adequate telephone logs of her conversations with outside contractors. Plaintiff has submitted some seven days of phone logs.

On Friday, October 19, Joan Peyser, one of the outside writers for the "New York, New York" exhibit called in frustration because she had not yet received her purchase order contract and wanted to work on the project over the weekend. Because Dr. Borrell had already gone home, Ms. Becker took the call and went to Dr. Borrell's desk to look for a copy. In Dr. Borrell's office she found the papers in disarray, other incompleted purchase orders and the order Ms. Peyser sought. Ms. Becker called Dr. Borrell at home to express unhappiness with the delay, and Dr. Borrell agreed to come to the office on Saturday to place the items in the mail.

On Sunday, October 21, after a reception for a panelist on an Eastern European exhibit, Ms. Becker mentioned to Mr. Suib Dr. Borrell's difficulties following through on purchase orders. Tr. 1401 (testimony of Richard Suib). Later that day Ms. Becker decided to ask Mr. Suib to remove Dr. Borrell from the "New York, New

York" project. Tr. 1144-45 (testimony of Gail Becker). Ms. Becker was going to Bulgaria in November for another exhibit and was upset about entrusting the ongoing project to Dr. Borrell as the deputy project manager.

Ms. Becker drafted a memorandum late Sunday evening in which she recommended removing Dr. Borrell from the project and suggested assigning her to a smaller project with more defined and narrower topics. Tr. 1150; *see* memorandum to Richard Suib from Gail Becker dated October 22, 1979, plf's ex. 10, enclosure 1. On October 22, Mr. Suib met with Ms. Becker and told her if she were convinced that Dr. Borrell couldn't adapt to the "New York, New York" project, he would have to recommend termination. Tr. 1403-04 (testimony of Richard Suib).

Mr. Suib informed Dr. Borrell by memorandum on October 23 to attend a meeting in his office on October 25, with a union representative if she wished. *See* memorandum to Ms. Phyllis Borrell from Richard Suib dated October 23, 1979, plf's ex. 10, enclosure 2. At this meeting, Mr. Suib told Dr. Borrell that he was going to recommend termination because she apparently could not adapt to the work program. Tr. 1406. Neither Dr. Borrell, her union steward, nor the union lawyer in attendance spoke in rebuttal at this meeting.

Afterwards, Ms. Cooke told Mr. Suib and Ms. Becker that they would have to write down the matters described orally to Dr. Borrell. Tr. 1002 (testimony of Lucinda Cooke). As a result, sometime between October 25 and October 31, Ms. Becker prepared two supporting but repetitious memoranda. *See* plf's ex. 10, enclosures 3 (seven pages) and 4 (nine pages). Dr. Borrell did not see these memoranda or the covering memorandum dated October 31 from Mr. Suib to Ms. Cooke, plf's ex. 20, until she filed a Freedom of Information Act request after her discharge. Tr. 250-Z (testimony of Dr. Borrell).

At trial, Dr. Borrell did not challenge the accuracy of these documents. Neither did any other witness. Instead, she asserted they were trivial and a pretext to cover her discharge for exposure of improper activities in the Exhibits Service. The Court has reviewed enclosures 3 and 4 in the context of the entire record. The complaint about plf's tardy completion of a travel voucher for reimbursement, plf's ex. 10, enclosure 3, at page 5, is certainly trivial. In all other respects, the Court finds enclosures 3 and 4 accurate and complete in explaining Dr. Borrell's inability to meet deadlines.

Upon receipt of the supporting memoranda, Ms. Cooke drafted the termination letter. It was approved by Angie Garcia, the director of personnel at ICA, and issued over her name on November 14, 1979. The reasons Ms. Garcia provided for Dr. Borrell's termination were "a) an inability to adapt to the overall work program in the Exhibits Service, and b) an inability to meet deadlines, primarily related to purchase order contracts." *See* plf's ex. 19, at 1. Ms. Becker's supporting memoranda, plf's ex. 10, enclosures 3 and 4, accurately and completely presented the specific instances underlying the second reason for Dr. Borrell's discharge. The first reason, Dr. Borrell's inability to adapt to the overall work program, was documented in part by Ms. Becker's memoranda. Additionally, Mr. Suib used his judgment from his personal interaction with Dr. Borrell, including the amount of time Dr. Borrell spent, or allegedly spent, at the Library of Congress, and the reports of other supervisors in deciding whether Dr. Borrell could adapt to the overall work program in the Exhibits Service.

Ms. Garcia stated pointedly that "Your termination during probation is not based on delinquency or misconduct and does not affect your eligibility for future reinstatement in the Federal Service in a position for which you qualify." Plf's ex. 19, at 2. She closed the

letter wishing Dr. Borrell good fortune in obtaining suitable employment.

Dr. Borrell worked on two other smaller projects under Mr. Meade and Mr. Gerran without any problems after October 25. Dr. Borrell's termination was postponed during the investigation of the charge of whistleblowing by legal action from December 14, 1979 until January 8, 1980.

II. CONCLUSIONS OF LAW

First Amendment Claim

Mt. Healthy School District v. Doyle, 429 U.S. 274 (1977) and *Mazaleski v. Truesdell*, 562 F.2d 701 (D.C. Cir. 1977) set forth the analysis for determining whether a public employee's first amendment rights have been violated by her discharge. The burden is on the plaintiff to show that her conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the decision to discharge her. Then the burden is on the defendant to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy School District v. Doyle, supra* at 287; *Mazaleski v. Truesdell, supra* at 715.

In determining whether or not the plaintiff's speech was constitutionally protected, courts balance the interests of the public employee as a citizen in communicating upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Supreme Court in *Pickering* looked at four factors: (1) whether the speech involved a matter of legitimate public concern; (2) whether it affected close working relationships, a need for confidentiality, or other special

employment relationship; (3) whether the statement was true, negligently false, or knowingly and recklessly false; and (4) the degree of harm caused by the statement in terms of disruption of the employee's duties or the employer's operations. *Id.*, 569-72; *see Harper v. Blumenthal*, 478 F. Supp. 176, 182 (D. D.C. 1979).

Dr. Borrell's complaints to her colleagues and supervisors about the alleged improprieties in the Exhibits Service fall within the range of constitutionally protected conduct. Her allegations concerned the conduct of a personal real estate business on agency time, wasteful expenditure of public funds, hiring relatives of government employees, and improper extension of contracts by the government. These matters obviously involve a matter of crucial concern to the public: the honest and efficient operation of government.

In addition, none of Dr. Borrell's complaints were knowingly or recklessly false. At the least, the complaint about the conduct of a real estate business was well founded and true. No disruption of agency operations or working relationships occurred as a result of the complaints Dr. Borrell made during her employment. And there is no question that First Amendment protection extends to public employees communicating privately with their supervisors. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979).

Although Dr. Borrell's complaints were constitutionally protected, the Court was not persuaded after trial that her complaints were a substantial or motivating factor in Ms. Becker's recommendation to remove plaintiff from the "New York, New York" project. Ms. Becker was dissatisfied with Dr. Borrell's work performance on the project; and that motivated her recommendation.

Neither did the Court find nor infer from the record that Dr. Borrell's complaints were a substantial or moti-

vating factor in Mr. Suib's recommendation of discharge. Mr. Suib relied on his knowledge of Dr. Borrell's work performance, including her inability to meet deadlines and her expressed dissatisfaction with her work assignments.

The "touchstone" for decision, the *Mazaleski* Court emphasized, "is the employee's job performance considered in its entirety." 562 F.2d at 715. The Court finds that Dr. Borrell was discharged for legitimate reasons, set forth in Ms. Garcia's letter of termination, plf's ex. 19, and supported by Ms. Becker's memoranda, plf's ex. 10, enclosures 3 and 4, and Mr. Suib's managerial judgment. This case differs from those in which there was no claim for discharge for reasons other than the protected constitutional conduct. *Cf. Tygrett v. Barry*, 627 F.2d 1279, 1287 n.9 (D.C. Cir. 1980) and 543 F.2d 840, 845 (D.C. Cir. 1974) (police officer discharged for advocating "sick-in" or "blue flu" and for no other reasons); *Porter v. Califano*, 592 F.2d 770, 775-76, 780 (5th Cir. 1979) (plaintiff discharged for distributing letter to fellow employees critical of supervisors; no claim that plaintiff wasn't performing her job adequately); *Ring v. Schlesinger*, 502 F.2d 479, 490 (D.C. Cir. 1974) (teacher discharged because of letter criticizing principal's conduct and not for any other reasons such as inadequacies of performance or conduct).

Under federal regulations, a probationary federal employee is subject to termination whenever his "work performance or conduct fails to demonstrate his fitness or his qualifications for continued employment." 5 C.F.R. § 315.804 (1982); Federal Personnel Manual, ch. 315, subch. 8, section 4(a)(2). Review of dismissal from federal employment, especially during the probationary period, is "limited to a determination of whether the agency substantially complied with its statutory and regulatory procedures, whether its factual determinations were supported by substantial evidence, and

whether its action was arbitrary, capricious or an abuse of discretion." *Heaphy v. United States Treasury Dept. Bureau of Customs*, 354 F. Supp. 396, 399 (S.D. N.Y. 1973), *aff'd mem.*, 489 F.2d 735 (2d Cir. 1974), *quoting Toohey v. Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970). *See also Shaw v. United States*, 622 F.2d 520 (Ct. Cl.) *cert. denied*, 449 U.S. 881 (1980); *Templeton v. Veterans Administration*, 540 F. Supp. 695, 698 (S.D. N.Y. 1982).

Dr. Borrell did not contest her failure to meet various deadlines for the "New York, New York" project. Rather, she characterized them as trivial. In *Heaphy, supra*, a probationary Customs Inspector alleged his dismissal was based on his immediate supervisor's prejudicial disposition and active dislike towards him. The reasons given for his discharge were improper and lengthy examination of baggage, general attitude and behavior on one occasion, absence without leave on another, and failure to report on a certain day. 354 F. Supp. at 398. The employee in *Heaphy*, as with Dr. Borrel, did not contest the occurrence of the incidents, but their characterization. *Id.* 399. The Court held that the plaintiff had not overcome the presumption of good faith conduct by government employees, *id.* at 401, and that "once it appears that the reasons given for discharge are work related, and that there is a rational relation between the discharge and the reasons, it cannot seriously be disputed that the discharge is arbitrary or capricious." *Id.* 402.

Ms. Becker, as the "New York, New York" project director, had the right, subject to her superiors, to determine what work would be done on the project, by whom, and when. *See National Treasury Employees Union v. Federal Labor Relations Authority*, No. 80-1895, slip op. at 20-21 (D.C. Cir. Oct. 12, 1982) ("Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the

very core of successful management of the employers' business, whether a private-sector enterprise or the public service operations of a federal agency"). Mr. Suib had the right under federal regulations to recommend discharging Dr. Borrell rather than merely reassigning her to another project. His decision was not so "totally unwarranted" that the Court will substitute its view of the appropriate response. *Cf. Gibson v. Veterans Administration and the United States*, 682 F.2d 1004, 1011 (D.C. Cir. 1982) (reviewing court's function in considering the appropriate sanction for employee misconduct).

Fifth Amendment Claim

In her complaint, Dr. Borrell claimed that her discharge violated her liberty interest secured by the due process clause of the Fifth Amendment. The Court rejected this argument because the letter of discharge stated explicity that the termination was not based on misconduct or delinquency and did not affect her eligibility for future federal employment. "To infringe one's liberty," stated the Court of Appeals in *Mazaleski v. Truesdell*, 562 F.2d at 713, "the effect of government action on future employment must extend beyond a disadvantage or impediment; it must 'foreclose his freedom to take advantage of other employment opportunities,'" *citing Board of Regents v. Roth*, 408 U.S. 564 (1972).

Plaintiff's discharge for failing to meet deadlines and adapt to the overall work program of the agency is in the area of work performance for which no infringement of liberty interests was found in *Mazaleski* itself and the cases cited therein at 562 F.2d at 714. *See also Templeton v. Veterans Administration, supra* at 697; *Heaphy v. United States Treasury Dept. Bureau of Customs, supra* at 400.

Dr. Borrell's right to procedural due process in her employment is measured by "existing rules or under-

standings that secure . . . benefits and that support claims of entitlement to those benefits." *Bishop v. Wood*, 426 U.S. 341, 344 n.7 (1975); *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Federal Personnel Manual, ch. 315, subch. 8, section 3, concerns the evaluation of probationary employees. Sections 3a(3) and (4) obligate the supervisor of a probationer "to study the employee's potentialities closely and try to determine whether the employee is suited for successful Government work" and to "initiate action to separate the employee . . . if it becomes apparent, after full and fair trial, that the employee's conduct, general character traits, or capacity do not fit him or her for satisfactory service." F.P.M. ch. 315, subch. 8, section 4, entitled "separation of probationers," mandates the procedures for termination of employment for unsatisfactory performance or conduct. Plaintiff did not allege these procedures were constitutionally insufficient. Section 4(a)(2) provides that "a decision to terminate should not be made in haste or until the employee has had a full and fair trial. The length of such a trial cannot be described in terms of so many days, weeks or months. It is whatever time it takes for the agency to appraise the employee's post-appointment performance and conduct carefully and to arrive at a considered judgment whether he should be retained or separated." Mr. Suib talked with Dr. Borrell in mid-August and mid-October concerning her work performance, and told her on October 25 he would recommend termination. The date of termination was set for December 14, 1979. This action complied with the requirements of Sections 3a(3), (4) and 4(a)(2).

Section 4(a)(3) provides the information required to be given an employee upon notice of termination: "The information in the notice on why he is being terminated must, at a minimum, consist of the agency's conclusions on the inadequacies of his performance or conduct; *it*

need not require complete and specific reasons. The employee is not given a right of reply." (Emphasis added.) The information in Ms. Garcia's letter notifying plaintiff of discharge complied with the requirements of this subsection: the two reasons were stated clearly. Section 8.4c requires the agency to follow its own procedural regulations. The agency complied with the regulations in F.P.M. ch. 315, subch. 8 and did not violate Dr. Borrell's procedural due process right in her job.

Privacy Claim

The Privacy Act states in pertinent part:

> Whenever any agency . . . fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual . . . the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(1)(C).

A violation of the Privacy Act under this provision occurs when an agency maintains inaccurate, irrelevant, untimely or incomplete personnel records and then relies upon such records to take an unfair action against an employee. Further, if it can be shown that in such circumstances the preparation, retention and use of such records by the agency was intentional or willful, then the individual is entitled to actual damages but in no case less than $1,000, reasonable attorney fees and costs. *Id.*, § 552a(g)(4).

Dr. Borrell alleged that placing Ms. Becker's memoranda, plf's ex. 10, enclosures 3 and 4, in a file violated the Privacy Act. Ms. Cooke testified these docu-

ments were not in plaintiff's personnel file, but since they may be considered evaluations by a supervisor, they fit within the definition of a record under the Privacy Act. *See* 5 U.S.C. § 552a(a)(4) (record includes information about an individual's employment history); *White v. United States Civil Service Commission*, 589 F.2d 713, 714-15 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 830 (1979).

Plaintiff has the burden of proof in cases such as this one which allege the maintenance of inaccurate records. *Mervin v. F.T.C.*, 591 F.2d 821, 827 (D.C. Cir. 1978). She has not shown that the documents were inaccurate. *Cf. R.R. v. Department of Army*, 482 F. Supp. 770, 775 (D.D.C. 1980) (factual assertions shown conclusively false). Neither were they incomplete in explaining Dr. Borrell's discharge for failure to meet deadlines. The memoranda were relevant: Ms. Cooke had requested them to provide documentation for Mr. Suib's recommendation of discharge. They were filed October 31, 1979, within a few days of the meeting so were timely.

The plaintiff did not carry her burden of proof with respect to the four criteria contained in the Privacy Act. On the contrary, the evidence shows that the memoranda challenged were sufficiently accurate, relevant, timely and complete to assure a fair determination of plaintiff's job performance. Plaintiff charges that she did not receive copies of these memoranda before she sought them with other items under FOIA. This point is of no consequence since the agency was under no requirement to supply them to her. As pointed out earlier, the Federal Personnel Manual requires the agency in issuing termination notices to give their conclusions on the inadequacy of the performance or conduct and "it need not require complete and specific reasons." The notice given was in conformance with the FPM requirements.

Further, the basic correctness of the allegation has been established in this trial. Since the agency acted in

compliance with the provisions of the Privacy Act and the FPM, plaintiff's claim under the Privacy Act count is denied.

Conclusion

The Court was not persuaded that Dr. Borrell's complaints about improprieties in the Exhibits Service were a factor in her exclusion from working on the "New York, New York" brochure or any other aspect of that project. Other employees were also excluded from design work on the project, to their displeasure. *See, e.g.*, Tr. 829-30 (testimony of John Vorhes). Dr. Borrell was appointed as the deputy project director for the "New York, New York" exhibit. Ms. Becker, with many years experience managing smaller exhibits in Eastern Europe and the Soviet Union, was appointed as the project director. Mr. Suib expected the two to complement each other. Instead, Dr. Borrell insisted constantly that she needed more training, assistance, and time before she could perform adequately as deputy project director. Neither had ever managed a budget or exhibit on the scale of this project. Ms. Becker was most anxious for the Soviet show to be superb. She feared that Dr. Borrell would be inadequate to take over the directorship in her absence.

There was insufficient evidence to show or infer that Ms. Becker or Mr. Suib perceived Dr. Borrell to be complaining about allegedly improper activities of other employees while she was assigned to the "New York, New York" project. Rather, her colleagues knew basically that she was dissatisfied with the research approach to the "New York, New York" show. *See, e.g.*, Tr. 876 (testimony of Edward Hunter); Tr. 818 (testimony of John Vorhes). The Court's overall conclusion was that the job as deputy project manager for the "New York, New York" show was simply too big for Dr. Borrell. She needed more direction than she got from Ms. Becker,

the project director, and less responsibility. The project's tight schedule did not permit this.

In finding that Dr. Borrell was discharged not for exercising her First Amendment rights, but for failing to perform the job of deputy project director adequately, the Court had the benefit of observing the demeanor of the witnesses and otherwise evaluating their credibility during the trial. *See Rogers v. Lodge*, 50 USLW 5041, 5044 (June 29, 1982); *Pullman Standard v. Swint*, 50 USLW 4425, 4429 (April 27, 1982).

An appropriate order accompanies this opinion.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

November 24, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3492

PHYLLIS F. BORRELL,
Plaintiff

v.

INTERNATIONAL COMMUNICATION AGENCY,
Defendant

JUDGMENT

[Filed Nov. 24, 1982]

This case having been remanded for reconsideration of plaintiff's constitutional and Privacy Act Claims, upon consideration of the entire record in this action, the briefs of the parties in the United States Court of Appeals submitted by plaintiff at the Court's request, and defendants' proposed findings as to the Privacy Act claim submitted at the Court's request, it is by the Court this 24th day of November 1982, for the reasons expressed in the accompanying memorandum opinion,

ORDERED that judgment be and hereby is entered for defendants on plaintiff's second cause of action under the First Amendment, plaintiff's third cause of action for denial of due process, and plaintiff's fourth cause of action for violation of the Privacy Act; and it is further

ORDERED that, the Court's dismissal of plaintiff's remaining causes of action having been affirmed by the Court of Appeals, no further issues remain and this action be and hereby is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3492

Judge June L. Green

PHYLLIS F. BORRELL,
Plaintiff,

v.

INTERNATIONAL COMMUNICATION AGENCY,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that PHYLLIS F. BORRELL, Plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Judgment and Memorandum Opinion for Defendants and further ordering that Plaintiff's remaining causes of action be dismissed, which were entered in this action on the 24th day of November, 1982.

/s/ Courts Oulahan
COURTS OULAHAN
Bar No. 26922
1527 Eighteenth St., N.W.
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Attorney for Plaintiff

January 19, 1983

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 79-3492

No. 83-1137

PHYLLIS F. BORRELL,
Appellant

v.

UNITED STATES INFORMATION AGENCY,
Appellee

Appeal from the United States District Court
for the District of Columbia

Before: Tamm, Wilkey, and Mivka, Circuit Judges.

JUDGMENT

[Filed Nov. 15, 1983]

This cause came on to be heard on the record from the United States District Court for the District of Columbia and was briefed and argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The district court's conclusion that appellant failed to prove that her complaints were a substantial or motivating factor in her discharge is not clearly erroneous.

The district court's finding that the agency complied with its procedural regulations regarding dismissal of probationary employees and that appellant established no claim under the Privacy Act, 5 U.S.C. § 552a(g)(1)(c) (1982), upon which relief could be granted also withstands review. Essential to our decision, especially with regard to the finding that appellant was not discharged for exercising her first amendment rights, is a necessary deference to the district court's "benefit of observing the demeanor of the witnesses and otherwise evaluating their credibility during the trial." *Borrell v. International Communication Agency*, No. 79-3492, at 23 (D.D.C. Nov. 24, 1982).

On consideration of the foregoing, it is ORDERED AND ADJUDGED by this court that the judgment of the district court appealed from herein is hereby affirmed.

Per Curiam.

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER,
Clerk

Circuit Judge Wilkey respectfully dissents.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1187

PHYLLIS F. BORRELL,
Appellant,

v.

UNITED STATES INFORMATION AGENCY,
Appellee.

Appeal from United States District Court
for the District of Columbia

APPELLANT'S PETITION FOR REHEARING
BY PANEL AND SUGGESTION FOR HEARING
OF REHEARING *EN BANC*

COURTS OULAHAN
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December 30, 1983

APPELLANT'S PETITION FOR REHEARING BY PANEL AND SUGGESTION FOR HEARING OR REHEARING *EN BANC*

I. CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

1.1 This case involves an issue of exceptional importance to this Court's role as the appellate safeguard against a "clearly erroneous" decision by the District Court denying the rights of a Federal whistle-blower under the First and Fifth Amendments and the Privacy Act, 5 U.S.C. § 552a(g).

1.2 Contrary to well-established precedent,[1] a panel majority in this case, with one member dissenting, in a 22-line summary Judgment (Exhibit A attached), invoked the "clearly erroneous" rule[2] to affirm the Memorandum Opinion of the District Court filed November 24, 1982 [I 1-24]. That Opinion was pursuant to a reversal in part and remand of an earlier District Court decision, *Borrell* v. *ICA*, 682 F.2d 981 (D.C. Cir. 1981). The panel majority also erroneously relied upon Local Rule 13(c) for its summary action.[3]

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[1] *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982); *United States* v. *United States Gypsum*, 333 U.S. 364 (1948); *Bundy* v. *Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Daniels* v. *Hadley Memorial Hospital*, 566 F.2d 749 (D.C. Cir. 1977); *Case* v. *Morrisette*, 475 F.2d 1300 (D.C. Cir. 1975).

[2] "*Rule 52. Findings by the Court. (a) Effect.* * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

[3] "*(c) Order Form of Decision.* In accordance with recommendations for improvement of judicial administration, this Court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appro-

1.3. If the precedent established by the panel majority is hereafter followed, the traditional role of the "clearly erroneous" rule as a "buckler and shield" for District Court findings of fact[4] would be expanded improperly to that of a "sword" to make them conclusive.[5] Further, the lack of any substantive or detailed analysis of fact or law in the summary Judgment does not provide a foundation on which the Supreme Court could "exercise adequately its power of review." *See, Borrell*, 682 F.2d at 992.[6] The panel majority, on the face of the summary Judgment, failed to "look to all of the evidence of record to determine whether the [factual] findings pass muster."[7]

II. STATEMENT OF THE CASE

2.1. Appellant's amended Complaint contained causes of action under the Civil Service Reform Act of 1978, the First and Fifth Amendments involving her rights as a whistle-blower, FOIA, and the Privacy Act [A 21-35]. After Appellant initially obtained a TRO on De-

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priate, e.g., affirmance by order of a decision or judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. See Rule 8(f). * * *" (Footnote omitted).

[4] *Case*, 475 F.2d at 1306.

[5] *United States Gypsum*, 333 U.S. at 395. "[T]he best possible appellate review [under Rule 52(a)] should be the goal. * * *" 5A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 52.01[8] at 2610 (2d ed. 1981). There was literally no "appellate review" in this case.

[6] The Supreme Court will not consider a question on certiorari to a Circuit Court of Appeals where "it is not clear whether the Court . . . passed on the claim" or the Court opinion is not enlightening. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *see, Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 312 (1971) ("unsure whether it [issue] was presented below" and decided).

[7] *Case*, 475 F.2d at 1308.

cember 31, 1979 [A 11-12, Parker, J.], her original complaint was dismissed January 10, 1980 [A 13-16, June L. Green, J.]. The Court of Appeals initially affirmed but, on rehearing, reversed the District Court and remanded the case for trial. [A 19].

2.2. After extensive discovery by Appellant, a bench trial was held in March 1981, involving 1,700 pages of transcript, more than 250 exhibits, and 21 witnesses. The District Court refused Appellant's request to submit proposed findings of fact and conclusions of law, because the Court had "several pads full of its own notes." [B 1496]. Then, three and one half months later, the District Court dismissed all of the causes of action. [A 45-50]. On appeal, this Court affirmed the dismissal of the causes of action under CSRA and FOIA. It reversed the dismissal of the other three causes of action and remanded them for compliance with its mandate and with Fed. R. Civ. P. 52(a). *Borrell*, 682 F.2d at 991-93.

2.3. The District Court again refused to accept proposed findings of fact and conclusions of law from Appellant. However, the Court requested, without notice to Appellant, proposed findings on the Privacy Act from Appellee. [I 24, 25-28]. The District Court's Memorandum "Opinion and Order," issued November 24, 1982, dismissed the remaining causes of action. [I 1-24].

III. STATEMENT OF FACTS

3.1. This case invelves the December 31, 1979 termination of a probationary Federal employee of the Exhibits Service within the Defendant Agency. After serving satisfactorily for several months as a contract consultant to the Service, Appellant was hired to work full-time as a Deputy Project Director. She worked for eight months on six major assignments.[8] In all but

[8] Appellant was a trained and well-educated professional, with experience in working for at least two foreign governments. She was the first outside professional hired by the Exhibits Service in

one of these assignments, during 1979, her work was judged wholly satisfactory by her superiors. *Borrell*, 682 F.2d at 984. Appellant was a bona fide whistle-blower, commencing by at least "the summer of 1979," concerning, among other things, waste and violation of law prohibiting the hiring of relatives of employees. *Borrell*, 682 F.2d at 983, 991. [I 4-7].

3.2. Between August and mid-October 1979, Appellant worked for Becker, a project officer who was supervised by Suib, Chief, Production and Development Division. Both of these individuals were supervised by Jacobs, the Director of the Exhibits Service. "* * * Until she began to complain, there had been no complaints from her superiors about her work performance—indeed, in June she was told [by Suib] that she had an 'excellent' probability of continued employment." *Borrell*, 682 F.2d at 984.[9] Becker, Suib, and Jacobs each were involved, directly or indirectly, in the charges of waste and violation of law made by Appellant.[10] Becker admitted one violation of law in which Suib acquiesced out of deference to Jacobs.[11] Each could have been charged

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eight years. She was shocked by the waste and nepotism she found in the Agency, but nevertheless carried out her duties conscientiously. [B Borrell 10-19, 244; TR 245-46, C PX 1, 4]. This Court has held her complaints to have been "clearly . . . reasonable." *Borrell*, 682 F.2d at 991. Further, Appellant never stated to fellow workers that her supervisers were "a passel of fools." The Agency misstated the record in making this claim during oral argument November 1, 1983. *See*, Vorhes TR 830.

[9] Jacobs agreed with the District Court at trial that Appellant had "sort of rock[ed] the boat." [B 640A]. As this Court stated in *Bundy*, 641 F.2d at 950, "[W]e would readily reject as clearly erroneous the District Court's finding that the supervisors in . . . [Appellant's] agency never took the ritual of harassment [her charges] seriously and that they therefore had no motive for retaliation against . . . [Appellant]. * * *"

[10] *E.g.*, B Becker 1129, 1226-28, 1234-37; C PX 185, 188, 189, 191, 193, 195, 196, 202, 230, 233.

[11] B Becker 1222-24, 1237-38, 1286-87; Suib 1463-64.

with a violation of 18 U.S.C. § 208(a) or 5 C.F.R. Part 310 [C PX 220], 22 C.F.R. § 10.735.201(a)(1)-(2) [C PX 203], and USIA (formerly ICA) MOA § 132.4 [C PX 218], with adverse action under 5 C.F.R. Part 752. The violations charged by Appellant were sustained by the Agency's own investigation.[12] Indeed, Jacobs took the Fifth Amendment at his deposition and at trial on the charges made by Appellant and investigated by the Agency—a fact deemed unimportant by the District Court in its alleged "credibility" evaluation of witnesses, upon which the panel majority relied.[13] The retaliatory charges framed by Becker in her memoranda, on or about October 30, 1979, never were disclosed to Appellant until production was made in March 1980 under her FOIA request. [C DX 3A]. These detailed charges, thoroughly refuted at trial, were the basis for Appellant's termination.

IV. THE PANEL MAJORITY ERRED IN ITS APPLICATION OF THE "CLEARLY ERRONEOUS" RULE

4.1. The "clearly erroneous" rule does not make "conclusive" the findings of a District Court.[14] The rule does not apply where, after a required thorough review of the record,[15] the District Court (1) mistakes the record

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[12] The 100-page report of the Agency's investigation [C PX 39A] was referred to the Justice Department, which declined to take any action. [I 7]. That does not diminish the seriousness of the complaints as an administrative matter, particularly since Jacobs was found to have violated Agency and Federal regulations in the report, and took the Fifth Amendment at deposition and trial. [B Jacobs 628, 632-35]. The illegal practices complained of by Appellant in 1979 apparently continued at least as late as October 1982, when the GAO Report to the Agency Director was released [I 40-49].

[13] B Jacobs 628-29, 632-35; also, Jacobs TR 599-601.

[14] *United States Gypsum*, 333 U.S. at 395.

[15] *Case*, 475 F.2d at 1307-08; *Daniels*, 566 F.2d at 756-57.

on an important issue of fact,[16] (2) makes erroneous conclusions of law, including failure to observe the mandate of an applicable decision by the Court of Appeals,[17] (3) makes conclusions involving mixed questions of fact and law,[18] or (4) makes "findings and inferences" which do not "readily support the 'ultimate' factual finding" on a violation of a constitutional or statutory right.[19] Local Rule 13(c) does not warrant the egregious departure from precedent in the summary Judgment.[20]

A. *Misstatement of Record Facts*

4.2. Based on a Government representation [I 26], the District Court found that "[a]t trial, Dr. Borrell did not challenge the accuracy of . . . [memoranda prepared by Becker at Suib's direction which resulted in Appellant's discharge]. Neither did any other witness." [I 12]. Such a finding could not have been made after a review of the "entire record." [I 2]. Appellant spent nearly one day at trial dealing with this question.[21] The

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[16] *Daniels*, 566 F.2d at 760.

[17] *Case*, 475 F.2d at 1307. "[T]he appellate court is not concluded in any degree by the trial court's view of the law." *Moore's Federal Practice, supra*, ¶ 52.03[2] at 2663.

[18] *Pullman-Standard*, 456 U.S. at 286 n.16.

[19] *Bundy*, 641 F.2d at 950.

[20] The case should have been decided by a full decision, containing an amplification and implementation of "new and unsettled questions of general importance" in this Court's 1982 decision under § 3.36(a), *ABA Comm. on Standards of Judicial Administration—Standards Relating to Appellate Courts* at 58, 60 (Approved Draft 1977). The summary Judgment was hardly supported, at a minimum, by "the authority or statement of grounds upon which it is based." *Id.*

[21] Borrell TR 91-110, 115-46, 150-53, 279-82, 308-18, 1617-22; see Becker TR 1178-91, 1245-50E, 1263-83, 1291-97. More than 30 exhibits were introduced on this subject. C PX 225, 237, 238; see

testimony of all other Exhibits Service witnesses, except for Becker, Suib, and Jacobs, contravened Becker's charges against Appellant and the Court's acceptance of them.[22]

4.3. A case such as this, including "precious" constitutional rights, enjoys "'preferred' status," requiring "strict scrutiny" of Governmental action. *Swope* v. *Lubbers*, 560 F. Supp. 1328, 1331 (W.D. Mich. 1983); see, *Borrell*, 682 F.2d at 991. This the District Court did not do, again violating Fed. R. Civ. P. 52(a).[23]

4.4. The District Court's "clearly erroneous" finding underpinned its conclusions that the First Amendment cause of action should be dismissed because Appellant was discharged for incompetency rather than for whistle-blowing [I 15-18], and that the Privacy Act claim should be dismissed because the Becker memoranda were

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also PX 46, 47, 51, 52, 57, 59, 61-72, 75-81, 84, 85, 87-91, 100. Becker's memoranda also were the subject of extensive cross-examination of Becker [B Becker 1212-87] and were specifically referred to at TR 1277-98, including a partial and reluctant admission of their inaccuracy. [TR 1294-95]. Indeed, Kessler, a co-worker, called the charges "ridiculous" and "beyond my belief." [B Kessler 908]. The content of the memoranda was argued on the Agency's motion to dismiss under Fed. R. Civ. P. 41(b), when the Court held that Appellant had made out a *prima facie* case. [B 946-49].

[22] B Meade 406-07, 419-21; Caldwell 462-64; Starzynski 511-13; Wellde 581; Fry 764-66; Hunter 880; Kessler 907; Gerran 1015-16.

[23] Findings "developed by one of the parties and mechanically adopted by the judge," particularly "by the prevailing party in a bitter dispute," make the "clearly erroneous" rule inapplicable. *Amstar Corp.* v. *Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980). "* * * These findings should represent the judge's own determination and not the . . . statements of successful counsel. * * *" Comm. Note of 1946 to Subdiv. (a), *Moore's Federal Practice, supra*, ¶ 52.01[5] at 2607.

not false [I 20-22]. The seriousness of that error is compounded by other misstatements of the record.[24]

B. *Legal Error: Failure to Make Findings Required by This Court*

4.5. The District Court failed to make detailed findings concerning Appellant's work performance in *all* assignments between January and December 1979, as required by this Court. *Borrell*, 682 F.2d at 992. In particular, the District Court did not describe or evaluate Appellant's (1) work as a contract consultant, praised by both Suib and Jacobs [Jacobs TR 640; PX 3]; (2) duties as a Deputy Project Director, denigrated by Suib and Becker as those of a "gofer," [Borrell TR 26-30, 169-70, 206; PX 53,99] or (3) work assignments on themes for a proposed Soviet show [Borrell TR 35-60; PX 40, 110], for an agricultural Third World show [Borrell TR 61-77; PX 119, 122, 127, 216], and for two other shows devoted to China and to solar power [B Gerran 1015-16, Meade 406-21; PX 37, 42, 55, 56] for which she was commended by her supervisors. The Court also ignored Appellant's complaints concerning gross waste of funds involved in the loss of valuable photographic transparencies, covered up by Suib and Jacobs and criticized in the Agency's investigative report [Borrell TR 250N-250R; C PX 39, Exh. D; PX 184].

4.6. The District Court significantly overlooked Becker's denial of a conference with Suib at her own home, at which Appellant's termination was decided. [B Becker 1218-19]. The Court made two findings about this cru-

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[24] These included an erroneous explanation of (1) why Appellant's termination date was postponed to January 8, 1980 [I 13; *see*, to the contrary, A 11-12]; (2) Appellant's delay in reporting Jacobs' five-year employment of his wife [I 5], which was only discovered in the Agency's own investigation; and (3) Appellant's meager telephone notes [I 10]; see, to the contrary, PX 46, 47, 61, 62, 66, 69.

cial meeting which Becker could not recall. [I 10-11; *see*, also B Suib 1401-04, 1411-12; Schneidman 1539-42].

4.7. Such omissions characterize a decision which was based, at the very least, upon failure again to comply with Fed. R. Civ. P. 52(a), *Borrell*, 682 F.2d at 991-92, and upon the deliberate selection of only such facts as would conform with the same result reached in 1980 and 1981—and reversed by this Court. *Barber* v. *United States*, 711 F.2d 128, 131 (9th Cir. 1983) ("* * * Since the findings of fact are stated in a way to suggest that they were predetermined by the outcome, we hold that they are clearly erroneous.").

C. *Legal Error: Erroneous Conclusions of Law*

4.8. "* * *[T]he core of the dispute [in this case] is whether the employee was discharged for complaining about agency irregularities, admitted in part, or for poor job performance. * * *" *Borrell*, 682 F.2d at 991. "* * * The touchstone for decision . . . is the employee's job performance considered in its entirety." *Mazaleski* v. *Truesdell*, 562 F.2d 701, 715 (D.C. Cir. 1977). The District Court failed to carry out both this mandate and the direction of *Mazaleski*.

4.9. The District Court also misconstrued Appellant's due process argument. It failed to discuss, or even refer to, the Agency's violation of its own regulations in Appellant's termination, established on the record.[25] The District Court merely held that the termination did not charge any misconduct. Therefore, no liberty interest in future employment was involved. [I 18].

4.10. The liberty interest claimed by Appellant, however, was to a statutory or regulatory expectancy that Agency regulations concerning the method whereby a probationer's job was terminated would be followed. *Ar-*

[25] [B Borrell 613-14; Suib 1419-38; Schneidman 1512-17; C PX 229, § 453.52(2)].

nett v. *Kennedy*, 416 U.S. 134, 151-52 (1974). Agency regulations "afforded . . . [Appellant] more procedural protection than is ordinarily accorded probationary government employees." *Ring* v. *Schlesinger*, 502 F.2d 479, 486 (D.C. Cir. 1974). Where first amendment rights are involved, "scrupulous compliance with . . . [agency] regulations is required to avoid any injustice." *Mazakeski*, 562 F.2d at 719.

4.11. The District Court's finding that Becker's memoranda were not false, unfair, or inaccurate provided the basis for its dismissal of the Privacy Act cause of action. [I 21]. A causal relationship existed between Becker's "erroneous record [attacking Appellant] and an adverse determination based on that record" under 5 U.S.C. § 552a(g)(1)(c).[26] The "willful and intentional" standard of the statute does not require "premeditated malice."[27] A showing of " 'only somewhat greater than gross negligence' " is sufficient.[28]

V. CONCLUSION

5.1. This was not a case where the evidence against Appellant was overwhelming. Quite the opposite was true. There may have been "substantial" evidence to support the Government's case. But the *preponderance* of evidence rule—not the substantial evidence rule—was applicable here. The District Court did not follow it. Instead, it picked and chose selective bits of testimony to build a case which attained the same result as in its two prior decisions. For example, even if Becker did not remember the important meeting (concerning Appellant's firing) taking place, her evasive and "amnesiac" testimony on this and other points had to be accepted in

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[26] *Edison* v. *Dep't of the Army*, 672 F.2d 840, 845 (11th Cir. 1982).

[27] *Parks* v. *IRS*, 618 F.2d 677, 683 (10th Cir. 1980).

[28] *Doe* v. *GSA*, 544 F. Supp. 530, 541 (D. Md. 1982).

order to reach the District Court's predetermined result. *See*, Paragraphs 4.6-4.7, *supra*.

5.2. The District Court's conclusion that "[t]here was insufficient evidence to show or infer that Ms. Becker or Mr. Suib perceived Dr. Borrell to be complaining about allegedly improper activities of other employees while she was assigned to the . . . [Soviet] show" [I 22-23] is incredible. The evidence was overwhelming, for example, that a senior Agency employee's wife was going to be, and was, employed by the Agency to perform work on the Soviet show, with the direct and indirect knowledge and participation of Becker, Suib, and Jacobs, and in violation of Federal statute and agency regulation. To find credible any lack of motive for retaliation in the face of this threat of public disclosure and possible disciplinary action is, as in *Bundy*, "disingenuous in the extreme." [29]

5.3. The District Court's conclusions that Appellant's "job as deputy project manager . . . was simply too big for . . . [her]" and that she failed to perform that job "adequately" are equally "disingenuous." [I 23]. Becker's retaliatory memoranda [C DX 3A], in the context of her testimony and that of Appellant, are a classic example of a situation where a supervisor is out to get rid of her deputy by "trivial" complaints and daily harassment. Becker and Suib did not want Appellant to succeed. Her frank and forthright criticisms of improprieties in the Service operations caused them to arrange her termination, despite her excellent work record with other supervisors.

5.4. The interests of appellate judicial administration and justice require a rehearing. Thereupon, the case

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[29] There, this Court rejected as "clearly erroneous" the District Court's finding that "Bundy's rejection of their [her superiors'] advances did not evoke in them any motive to take any action against her." *Bundy*, 641 F.2d at 940, 941.

should be adjudicated by this Court and injunctive relief granted, with remand to another District Court judge on the issue of damages, back pay, and attorney's fees. *State of Connecticut* v. *Schweiker*, 684 F.2d 979 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1197 (1983).

Respectfully submitted,

/s/ Courts Oulahan
COURTS OULAHAN
Attorney for Appellant

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 79-03492

No. 83-1137

PHYLLIS F. BORRELL,
Appellant

v.

UNITED STATES INFORMATION AGENCY, ET AL.

Before: Tamm, Wilkey and Mikva, Circuit Judges

ORDER

[Filed Jan. 13, 1984]

On consideration of the Petition for Rehearing of Appellant, filed December 30, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1137

PHYLLIS F. BORRELL,
Appellant
v.
UNITED STATES INFORMATION AGENCY, ET AL.

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

[Filed Jan. 13, 1984]

The Suggestion for Rehearing *en banc* of Appellant, filed December 30, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX G

STATUTES AND RULES

5 U.S.C. § 552a. Records maintained on individuals

(a) Definitions. For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title.

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or diseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

• • • •

(g)(1) Civil Remedies. Whenever any agency—

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

• • • •

FEDERAL
RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * * *

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
GENERAL RULES

RULE 13.

OPINIONS OF THE COURT

* * * *

(c) *Order Form of Decision.* In accordance with recommendations for improvement of judicial administration,[1] this Court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. See Rule 8(f). If the parties have agreed to such disposition, they may so state in their briefs or may so stipulate at any time prior to decision. In any such case the Court will promptly issue a judgment unless compelling reasons otherwise dictate.

[1] Report of the President's Commission on Crime in the District of Columbia (1966) p. 308; and see Canon 19—American Bar Association Canons of Judicial Ethics; position adopted by the Judicial Conference of the United States, March 16, 1964.

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